Billing Code 3510-22-S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 226

[Docket No. ; I.D. 101405C]

RIN 0648-AT84

Endangered and Threatened Species; Revision of Critical Habitat for the Northern Right Whale in the Pacific Ocean

AGENCY: National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Commerce.

ACTION: Proposed rule; request for comment.

SUMMARY: National Marine Fisheries Service (NMFS) proposes to revise the current critical habitat for the northern right whale (Eubalaena glacialis) by designating additional areas within the North Pacific Ocean. Two specific areas proposed for designation, one in the Gulf of Alaska and another in the Bering Sea, comprise approximately 95,200 square kilometers (36,750 square miles) of marine habitat. Based upon the impacts analysis prepared for this action, NMFS has concluded that the benefits of exclusion of any area from the proposed critical habitat designation do not outweigh the benefits of inclusion. Consequently, no exclusions are proposed.

NMFS must consider the broad effects of this designation (revision). NMFS solicits comments from the public on all aspects of the proposal, including information on the economic, national security, and other relevant impacts of the proposed designation. NMFS may revise this proposal and solicit additional comments prior to final designation to address new information received during the comment period.

DATES: Comments on this proposed rule must be received by close of business on [Insert date 60 days after date of publication in the FEDERAL REGISTER]. Requests

for public hearings must be made in writing by [Insert date 45 days after date of publication in the FEDERAL REGISTER].

ADDRESSES: Send comments to Kaja Brix, Assistant Regional Administrator, Protected Resources Division, Alaska Region, NMFS, Attn: Lori Durall. Comments may be submitted by:

- E-mail: 0648-AT84-NPRWCH@noaa.gov. Include in the subject line the following document identifier: Right Whale Critical Habitat PR. E-mail comments, with or without attachments, are limited to 5 megabytes.
- Webform at the Federal eRulemaking Portal: www.regulations.gov. Follow the instructions at that site for submitting comments.
- Mail: P. O Box 21668, Juneau, AK 99802
- Hand delivery to the Federal Building : 709 W. 9th Street, Juneau, Alaska .
- Fax: (907) 586-7012

The proposed rule, maps, stock assessments, and other materials relating to this proposal can be found on the NMFS Alaska Region website http://www.fakr.noaa.gov/.

FOR FURTHER INFORMATION CONTACT**:** Brad Smith, (907) 271-3023, or Marta Nammack, (301) 713-1401.

SUPPLEMENTARY INFORMATION: The Endangered Species Act of 1973, as amended, [16 U.S.C. 1531] (ESA) imposes requirements upon Federal agencies regarding endangered or threatened species of fish, wildlife, or plants, and habitats of such species that have been designated as critical. The U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) share responsibility for administering the ESA. Endangered or threatened species under the authority of NMFS are found in 50 CFR 222.102 and 224.101, and include the northern right whale.

Background

The northern right whale is a member of the family Balaenidae. It is found in the

Pacific and Atlantic Oceans and is closely related to the right whales that inhabit the Southern Hemisphere. Right whales are large baleen whales which grow to lengths and weights exceeding 18 meters and 100 tons, respectively. They are filter feeders whose prey consists exclusively of zooplankton (notably copepods; see below). Right whales attain sexual maturity at an average age of 8 to 10 years, and females produce a single calf at intervals of 3 to 5 years (Kraus et al., 2001). Their life expectancy is unclear, but they are known to reach 70 years in some cases (Hamilton et al., 1998; Kenney, 2002).

Right whales are generally migratory, with at least a portion of the population moving between summer feeding grounds in temperate or high latitudes and winter calving areas in warmer waters (Kraus et al., 1986; Clapham et al., 2004). In the North Pacific, the feeding range is known to include the Gulf of Alaska, the Aleutian Islands, the Bering Sea and the Sea of Okhotsk. Although a general northward movement is evident in spring and summer, it is unclear whether the entire population undertakes a predictable seasonal migration, and the location of calving grounds remains completely unknown (Scarff, 1986; Scarff, 1991; Brownell et al., 2001; Clapham et al., 2004; Shelden et al., 2005). Further details of occurrence and distribution are provided below.

In the North Pacific, whaling for right whales began in the Gulf of Alaska (known to whalers as the "Northwest Ground") in 1835 (Webb, 1988). Right whales were extensively hunted in the western North Pacific in the latter half of the 19th century, and by 1900 were scarce throughout their range. Right whales were protected worldwide in 1935 through a League of Nations agreement. However, because neither Japan nor the former USSR signed this agreement, both nations were theoretically free to continue right whaling until 1949, when the newly created International Whaling Commission endorsed this ban. Following this, a total of 23 northern right whales in the North Pacific were legally killed by Japan and the former USSR under Article VIII of the International Convention for the Regulation of Whaling (1946), which permits the taking of whales for

scientific research purposes. However, it is now known that the USSR illegally caught many right whales in the North Pacific (Doroshenko, 2000; Brownell et al., 2001). In the eastern North Pacific, 372 right whales were killed by the Soviets between 1963 and 1967; of these, 251 were taken in the Gulf of Alaska south of Kodiak, and 121 in the southeastern Bering Sea. These takes devastated a population that, while undoubtedly small, may have been undergoing a slow recovery (Brownell et al., 2001).

As a result of this historic and recent hunting in both the Pacific and Atlantic Oceans, northern right whales today are among the most endangered of all whales worldwide. Northern right whales were listed in 1970 following passage of the Endangered Species Conservation Act (ESCA) of 1969, and automatically granted endangered status when the ESCA was repealed and replaced by the ESA. Right whales were also protected under the Marine Mammal Protection Act of 1972. NMFS issued a Recovery Plan for the northern right whale in 1991, covering animals in both the North Atlantic and North Pacific (NMFS, 1991). Brownell et al. (2001) noted that there was no evidence for exchange between the western and eastern Pacific, and that the two populations had different recovery histories; consequently, they argued that these stocks should be treated as separate for the purpose of management, a division which has been duly recognized by NMFS in Stock Assessment Reports (Angliss and Lodge, 2004).

In the western North Pacific (the Sea of Okhotsk and adjacent areas), current abundance is unknown but is probably in the low to mid-hundreds (Brownell et al., 2001). There is no estimate of abundance for the eastern North Pacific (Bering Sea, Aleutian Islands and Gulf of Alaska), but sightings are rare; most biologists believe the current population is unlikely to exceed 100 individuals, and is probably much smaller. Prior to the illegal Soviet catches of the 1960s, an average of 25 whales was observed each year in the eastern North Pacific (Brownell et al., 2001); in contrast, the total number of records in the 35 years from 1965 to 1999 was only 82, or 2.3 whales per

annum.

Since 1996, NMFS and other surveys (directed or otherwise) have detected small numbers of right whales in the southeastern Bering Sea, including an aggregation estimated at 24 animals in the summer of 2004. Photo-identification and genetic data have identified 17 individuals from the Bering Sea, and the high inter-annual resighting rate further reinforces the idea that this population is small. Right whales have also been sighted in the northern Gulf of Alaska, including a sighting in August 2005. However, the overall number of right whales in the North Pacific using habitats other than the Bering Sea is not known.

The taxonomic status of right whales worldwide has recently been revised in light of genetic analysis (see Rosenbaum et al., 2000; Gaines et al., 2005). Applying a phylogenetic species concept to molecular data separates right whales into three distinct species: Eubalaena glacialis (North Atlantic), E. japonica (North Pacific) and E. australis (Southern Hemisphere). NMFS formally recognized this distinction for the purpose of management in a final rule published on April 10, 2003 (68 FR 17560), but subsequently determined that the issuance of this rule did not comply with the requirements of the ESA, and thus rescinded it (70 FR 1830; January 11, 2005) prior to beginning the process anew. At this time North Atlantic and North Pacific right whales are thus both officially considered to be "northern right whales" (Eubalaena glacialis) under the ESA.

Critical Habitat Designation History

Section 3 of the ESA defines critical habitat (CH) as "(i) the specific areas within the geographical area occupied by the species, at the time it is listed,.... on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and (ii) specific areas outside the geographical area occupied by the species at the time it is listed upon a determination by the Secretary that such areas are essential for the conservation of

the species." Section 3 of the ESA (16 U.S.C. 1532(3)) also defines the terms "conserve," "conserving," and "conservation" to mean "to use, and the use of, all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary."

Section 4 of the ESA requires that before designating CH, NMFS must consider economic impacts, impacts on national security and other relevant impacts of specifying any particular area as CH, and the Secretary may exclude any area from CH if the benefits of exclusion outweigh the benefits of inclusion, unless excluding an area from CH will result in the extinction of the species concerned. Once CH is designated, section 7(a)(2) of the ESA requires that each Federal agency shall, in consultation with and with the assistance of NMFS, ensure that any action authorized, funded or carried out by such agency is not likely to result in the destruction or adverse modification of CH.

Three areas in the North Atlantic Ocean were designated as CH for northern right whales in 1994; the Great South Channel, Cape Cod Bay, and waters of the Southeastern United States off Florida and Georgia. NMFS is currently analyzing the physical and biological features essential to the conservation of the northern right whale in the Atlantic Ocean, and has outlined steps it will take to propose any revisions to that designated CH that might be supported by new information and analysis (68 FR 51758; August 28, 2003).

Previous Federal Action and Related Litigation

In October 2000, NMFS was petitioned by the Center for Biological Diversity to revise the CH for the northern right whale by designating an additional area in the North Pacific Ocean. In February 2002, NMFS announced its decision that CH could not be designated in the North Pacific at that time because the essential biological requirements of the population were not sufficiently understood. However, in June 2005, a Federal

judge found this reasoning invalid and ordered the agency to take action with respect to designating CH for the northern right whale in the North Pacific Ocean no later than October 28, 2005 (Center for Biological Diversity v. Evans, Civ. No. 04-04496, N.D. Cal. June 14, 2005). In compliance with that order, NMFS is proposing to revise the current CH for this species by designating areas within the Gulf of Alaska and Bering Sea as CH under the ESA. The range of the northern right whale extends to waters of the western North Pacific. These waters are outside the United States, and because CH is not to be designated within foreign countries or outside of U.S. jurisdiction [50 CFR 424.12(h)], NMFS has not considered designation of CH for that region.

Critical Habitat

Geographical Area Occupied by the Species

The ESA defines CH (in part) as areas within the geographical area occupied by the species at the time it was listed under the ESA. Because this geographical area has not been previously described for the northern right whale in the Pacific Ocean, it is necessary to establish this range when proposing to designate CH. The northern right whale was listed as endangered in 1973. Prior to the onset of commercial whaling in 1835, right whales were widely distributed across the North Pacific (Scarff, 1986; Clapham et al., 2004; Shelden et al., 2005). By 1973, the northern right whale in the Pacific Ocean had been severely reduced by commercial whaling. Sighting data from this remnant population are too sparse to identify the range of these animals in 1973. However, no reason exists to suspect that the right whales that remain alive today inhabit a substantially different range than right whales alive during the time of the Soviet catches; indeed, given the longevity of this species, it is likely that some of the individuals who survived that whaling episode remain extant.

Both the southeastern Bering Sea and the western Gulf of Alaska (shelf and slope waters south of Kodiak) have been the focus of many sightings (as well as the illegal

Soviet catches) in recent decades. In general, the majority of northern right whale sightings (historically and in recent times) in the Northeast Pacific have occurred from about 40º N to 60º N latitude (lat.). There are historical records from north of 60º N lat., but these are rare and are likely to have been misidentified bowhead whales. Right whales have on rare occasions been recorded off California and Mexico, as well as off Hawaii. However, as noted by Brownell et al. (2001), there is no evidence that either Hawaii or the west coast of North America from Washington State to Baja California were ever important habitats for right whales. Given the amount of whaling effort as well as the human population density in these regions, it is highly unlikely that substantial concentrations of right whales would have passed unnoticed. Furthermore, no archaeological evidence exists from the U.S. west coast suggesting that right whales were the target of local native hunts. Consequently, the few records from this region are considered to represent vagrants. The geographical area occupied by the northern right whale at the time it was listed under the ESA extends over a broad area of the North Pacific Ocean as depicted in Figure 1.

[GPO, INSERT FIGURE 1 HERE}

Unoccupied Areas

ESA section 3(5)(A)(ii) further defines CH to include "specific areas outside the geographical area occupied" if the areas are determined by the Secretary of Commerce (Secretary) to be "essential for the conservation of the species." 50 CFR 424.12(e) specifies that NMFS "shall designate as critical habitat areas outside the geographical area presently occupied by a species only when a designation limited to its present range would be inadequate to ensure the conservation of the species." NMFS is not proposing to designate any areas not occupied at the time of listing because any such areas are presently unknown (if they exist), and the value of any such habitat in conserving this species cannot be determined. Future revisions to the CH of the northern right whale may consider new information which might lead to designation of areas outside the occupied area of these whales.

Physical or Biological Features Essential to the Conservation of the Species (Primary Constituent Elements)

In determining what areas are CH, 50 CFR 424.12(b) requires that NMFS consider those physical or biological features that are essential to the conservation of a given species and that may require special management considerations or protection, including space for individual and population growth and for normal behavior; food, water, air, light, minerals, or other nutritional or physiological requirements; cover or shelter; sites for breeding, reproduction, and rearing of offspring; and habitats that are protected from disturbance or are representative of the historical geographical and ecological distribution of a species. The regulations further direct us to "focus on the principal biological or physical constituent elements . . . that are essential to the conservation of the species," and specify that the "[K]nown primary constituent elements shall be listed with the critical habitat description." The regulations identify primary constituent elements (PCE) as including, but not limited to: "roost sites, nesting grounds,

spawning sites, feeding sites, seasonal wetland or dryland, water quality or quantity, host species or plant pollinator, geological formation, vegetation type, tide, and specific soil types." An area must contain one or more PCEs to be eligible for designation as CH; an area lacking a PCE may not be designated in the hope it will acquire one or more PCEs in the future.

NMFS scientists considered PCEs for the northern right whale in the Pacific Ocean during a workshop held during July 2005. Unfortunately, many data gaps exist in our knowledge of the ecology and biology of these whales, and very little is known about the PCEs which might be necessary for their conservation. The life-requisites of these whales for such factors as temperatures, depths, and substrates are unknown, or may be highly variable. One certainty is the metabolic necessity of prey species to support feeding by right whales. Examination of harvested whales in the North Pacific and limited plankton tows near feeding right whales in recent years show that several species of large copepods and other zooplankton constitute the primary prey of the northern right whale in the North Pacific Ocean.

The PCEs for the northern right whale in the North Pacific Ocean are large copepods in areas where right whales are known or believed to feed. Specifically, these are: Calanus marshallae, Neocalanus cristatus, N. plumchris. and Thysanoëssa raschii, a copepod whose very large size, high lipid content and occurrence in the region likely makes it a preferred prey item for right whales (J. Napp, pers. comm.). A description of the proposed CH areas (below) establishes the presence of these PCEs within those areas proposed as CH. In addition to the physical presence of these PCEs within the proposed CH, it is likely that certain physical forcing mechanisms are present which act to concentrate these prey in densities which allow for efficient foraging by right whales. There may in fact be critical or triggering densities below which right whale feeding does not occur. Such densities are not presently described for the right whales in the North

Pacific. The PCEs, essential for the conservation of the northern right whale in the North Pacific and these physical forcing or concentrating mechanisms contribute to the habitat value of the areas proposed for designation.

Special Management Considerations or Protection

An occupied area may be designated as CH if it contains physical and biological features that "may require special management considerations or protection." 50 CFR 424.02(j) defines "special management considerations or protection" to mean "any methods or procedures useful in protecting physical and biological features of the environment for the conservation of listed species." NMFS considered whether the copepods and other zooplankton in feeding areas, which have been identified as the PCEs for the northern right whale in the North Pacific Ocean, may require special management considerations or protection.

Copepods can be affected by physical and chemical alterations within the water column both by natural processes such as global climate change or the Pacific Decadal Oscillation, as well as by pollution from various potential sources, including oil spills and discharges resulting from oil and gas drilling and production. The outer continental shelf (OCS) oil and gas exploration and development permits or authorizations already are routinely conditioned with operational restraints, mitigative measures, or technological changes to protect the marine environment from these impacts. While such management measures and protections are not necessarily designed to protect copepods or zooplankton in right whale feeding areas per se, they could be useful in protecting these PCEs for the conservation of northern right whales in the North Pacific Ocean.

NMFS specifically requests comment on the extent to which the designated PCEs may require special management considerations or protection.

Proposed Critical Habitat

The current abundance of northern right whales in the North Pacific Ocean is considered to be very low in relation to historical numbers or their carrying capacity (not determined). The existence of a persistent concentration of right whales found within the Southeastern Bering Sea since 1996 is somewhat extraordinary in that it may represent a substantial portion of the remaining population. These areas of concentration where right whales feed are characterized as containing the copepod PCEs described above. NMFS considers these feeding areas, supporting a significant assemblage of the remaining right whales in the North Pacific, to be critical in terms of right whale conservation. For the reasons given below, NMFS has based designation of CH on these areas, rather than where right whales have appeared sporadically or in transit. NMFS has been able to substantiate the assumption that these areas are right whale feeding areas by observations of feeding behavior, direct sampling of plankton near feeding right whales, or records of stomach contents of dead whales. These assumptions underlie the proposed CH areas shown in Figure 2 and described below. Two areas are proposed, as depicted in Figure 2: an area of the southeastern Bering Sea and an area south of Kodiak Island in the Gulf of Alaska.

[GPO, INSERT FIGURE 2 HERE]

Shelden et al. (2005) reviewed prey and habitat characteristics of northern right whales in the North Pacific. They noted that habitat selection is often associated with features that influence abundance and availability of a predator's prey. Right whales in the North Pacific are known to prey upon a variety of zooplankton species. Availability of these zooplankton greatly influences the distribution of the small North Pacific population on their feeding grounds in the Southeastern Bering Sea (SEBS) and Gulf of Alaska (GOA). Right whales are known to feed on copepod patches of very high density, and these patches may typically be small and unpredictably distributed over space and time (Mayo and Marx, 1990).

Typical zooplankton sampling is too broad-scale in nature to detect patches of these densities, and directed studies employing fine-scale sampling cued by the presence of feeding right whales are the only means of doing this (Mayo and Marx, 1990). Accordingly, there may be no obvious correlation between the abundance and distribution of copepods (as measured by broad-scale oceanographic sampling) and the distribution of right whales (M. Baumgartner, in prep.) In light of this, NMFS must rely upon the whales themselves to indicate the location of important feeding areas in the North Pacific. Aggregations of right whales in high latitudes can be used with high confidence as an indicator of the presence of suitable concentrations of prey, and thus of feeding behavior by the whales. Right whales feed daily during spring and summer, and studies in the North Atlantic have consistently found an association between concentrations of whales and feeding behavior, with dense copepod patches recorded by oceanographic sampling around such groups of whales (Mayo and Marx 1990, Baumgartner *et al.* 2003, 2003b). In the North Atlantic, an analysis of sighting data by NMFS indicated that a density of 4 or more right whales per 100 nm^2 was a reliable indicator of a persistent feeding aggregation (Clapham and Pace 2001), and this has been used for Dynamic Area Management fisheries closures to reduce the risk of

right whales becoming entangled in fishing gear. While this metric is a reliable indicator of the presence of persistent feeding aggregations in the North Atlantic, it is not necessarily the only metric suitable for application in the North Pacific; the much smaller population of right whales in the eastern North Pacific Ocean typically results in sightings of single animals or pairs. Unlike with larger groups, such small numbers sometimes indicate transient passage through an area and thus cannot be unequivocally linked with feeding behavior. However, while sporadic sightings of right whales in such small numbers generally would not be considered a reliable indication of a feeding area, consistent sightings of right whales - even of single individuals and pairs - in a specific area in spring and summer over a long period of time is sufficient indication that the area is a feeding area containing suitable concentrations of copepods.

Therefore, in the absence of data which describe the densities, as well as presence, of the PCEs themselves, the distribution of right whales is used here as a proxy for the existence of suitably dense copepod patches and thus to identify the areas proposed herein for designation as CH. NMFS has used sighting records since the time of listing to make this determination because these records are more recent and are taken to be a more reliable indicator of current distribution than historical sightings, especially given that most of the latter relate to animals that were removed from the population by whaling.

Southeastern Bering Sea

NMFS proposes to designate CH in the Bering Sea (Figure 2) to be described as an area delineated by a series of straight lines connecting the following coordinates in the order listed: 58˚00' N/168˚00' W; 58˚00' N/163˚00' W; 56˚30' N/161˚45' W; 55˚00' N/166˚00' W; 56˚00' N/168˚00' W and returning to 58˚00' N/168˚00' W. The area described by these boundaries lies completely within the waters of the United States and its Exclusive Economic Zone, outside of waters of the State of Alaska. State waters

extend seaward for 3 nautical miles; very few sightings occurred within this area. Right whale encounters occurring after ESA-listing in 1973 totaled 182 within this area, out of 184 encounters north of the Aleutian Islands during this time period.

Gulf of Alaska

NMFS proposes to designate CH in the Gulf of Alaska (Figure 2), to be described as an area delineated by a series of straight lines connecting the following coordinates in the order listed: 57˚03' N/153˚00' W, 57 ˚18' N/151 ˚30' W, 57 ˚00' N/ 151˚ 30' W, 56˚45' N/153˚00' W, and returning to 57˚03' N/153˚00' W. The area described by these boundaries lies completely within the waters of the United States and its Exclusive Economic Zone. Right whale encounters occurring after ESA-listing in 1973 totaled 5 within this area, out of 14 encounters in the Gulf of Alaska during this time period.

Existence of the PCEs Within the Proposed Critical Habitat

Southeastern Bering Sea Slope Waters

The Bering Sea slope is a very productive zone, sometimes referred to as the 'Greenbelt,' where annual primary production can exceed that on the adjacent shelf and basin by 60 percent and 270 percent, respectively (Springer et al., 1996). Physical processes at the shelf edge, such as intensive tidal mixing, eddies and up-canyon flow, bring nutrients to the surface, thereby supporting enhanced productivity and elevated biomass of phytoplankton, zooplankton, and fish. Northern right whales in the western North Pacific have been observed in association with oceanic frontal zones that produce eddies southeast of Hokkaido Island, Japan, and southeast of Cape Patience (Mys Terpeniya), Sakhalin Island, in the Okhotsk Sea (Omura et al., 1969). Whether or not the Bering Slope Current, or eddies shed from it, support production or entrain right whale prey is unknown.

From August to October in 1955 and 1956, Soviet scientists observed aggregations of Calanus between the Pribilof Islands and the Aleutian Islands (around

170ºW long.) that were identified as C. finmarchicus, though, as mentioned above, were probably C. marshallae (Klumov, 1963). Flint et al. (2002) also report high concentrations of C. marshallae at frontal zones near the Pribilof Islands, with especially high biomass noted for the subthermohaline layer. This oceanographic front effectively separates slope and outer shelf Neocalanus spp. from the inshore middle shelf community of C. marshallae (Vidal and Smith, 1986). Right whales were found on both sides of this frontal zone (that coincides with the shelf break at 170 m) during both the 19th and 20th centuries. This is similar to the habitat described by Baumgartner et al. (2003a) for right whales feeding in the North Atlantic. Six right whales that were caught under scientific permit in late July-early August 1962-63 in Bering Sea slope waters had exclusively consumed Neocalanus cristatus (Calanus cristatus: Omura et al., 1969). Although oceanic species such as Neocalanus usually enter diapause and migrate to depths greater than 200 m by late summer in the slope waters of the Bering Sea (Vidal and Smith, 1986), right whales may still be able to use these resources by targeting regions where the bottom mixed layer forces the zooplankton into shallower, discrete layers (e.g. Baumgartner et al., 2003a).

Southeastern Bering Sea (SEBS) Middle-Shelf Waters

The SEBS shelf has been the focus of intense oceanographic study since the late 1970s (e.g. Schumacher et al., 1979; Coachman, 1986, Napp et al., 2000; Hunt et al., 2002a; Hunt et al., 2002b), largely due to the considerable commercial fishing effort in the area (National Research Council, 1996). Coachman (1986) described the now well-established hydrographic domains of the inner-, middle- and outer-shelf, separated by a front or transition zone at roughly the 50-m (inner front) and 100-m (outer front) isobaths. During the 1990s, research focused on these domains demonstrated dynamic advection of nutrient-rich Bering slope water onto the shelf in both winter and summer, via eddies, meanders and up-canyon flow (Schumacher and Stabeno, 1998; Stabeno and Hunt, 2002).

These intrusions of nutrient-rich water, physical factors related to water column stratification, and long summer day length result in a very productive food web over the SEBS shelf (e.g., Livingston et al.,1999; Napp et al., 2002; Coyle and Pinchuk, 2002; Schumacher et al., 2003). Specifically, copepod species upon which right whales feed (e.g. Calanus marshallae, Pseudocalanus spp. and Neocalanus spp.) are among the most abundant of the zooplankton sampled over the middle shelf (Cooney and Coyle, 1982; Smith and Vidal, 1986). Small, dense patches (up to densities greater than 500 mg/m^{-3}) of euphausiids (Thysanoessa raschii, T. inermis), potential right whale prey, have also been reported for waters near the SEBS inner front (Coyle and Pinchuk, 2002).

Zooplankton sampled near right whales seen in the SEBS in July 1997 included C. marshallae, Pseudocalanus newmani, and Acartia longiremis (Tynan, 1998). C. marshallae was the dominant copepod found in these samples as well as samples collected near right whales in the same region in 1999 (Tynan et al., 2001). C. marshallae is the only "large" calanoid species found over the SEBS middle shelf (Cooney and Coyle, 1982; Smith and Vidal, 1986). Concentrations of copepods were significantly higher in 1994-98 than in 1980-81 by at least an order of magnitude (Napp et al., 2002) and Tynan et al. (2001) suggest that this increased production may explain the presence of right whales in middle shelf waters. However, at least three right whales were observed in 1985 in the same location as the middle shelf sightings reported in the late 1990s (Goddard and Rugh, 1998).

Gulf of Alaska

The central GOA is dominated by the Alaskan gyre, a cyclonic feature that is demarcated to the south by the eastward flowing North Pacific Current and to the north by the Alaska Stream and Alaska Coastal Current, which flow westward near the shelf break. The bottom topography of this region is rugged and includes seamounts, ridges, and submarine canyons along with the abyssal plain. Strong semi-diurnal tides and current

flow generate numerous eddies and meanders (Okkonen et al., 2001) that influence the distribution of zooplankton.

Copepods are the dominant taxa of mesozooplankton found in the Gulf of Alaska and are patchily distributed across a wide variety of water depths. Three large herbivorous species comprise more than 70 percent of the biomass: N. cristatus, N. plumchrus, and Eucalanus bungii (Cooney 1986, 1987). In northern GOA shelf waters, the late winter and spring zooplankton is dominated by calanoid copepods (Neocalanus spp.), with a production peak in May; this is a cycle that appears resistant to environmental variability associated with El Niño/Southern Oscillation (ENSO) (Coyle and Pinchuk, 2003). In oceanic waters (50ºN lat., 145ºW long.), N. plumchrus dominate (Miller and Nielsen, 1988; Miller and Clemons, 1988) and have demonstrated dramatic shifts in the timing of annual peak biomass from early May to late July (Mackas et al., 1998). From late summer through autumn, N. plumchrus migrate to deep water ranging from 200 m to 2000 m depending on location within the GOA (Mackas et al., 1998). The three right whales caught under scientific permit on August 22, 1961, south of Kodiak Island had all consumed N. plumchrus (Calanus plumchrus: Omura et al., 1969), potentially by targeting areas where adult copepods remained above 200 m (e.g. Baumgartner et al., 2003a).

The area proposed as CH within the SEBS presents several similarities to that proposed within the Gulf of Alaska. Both areas are influenced by large eddies, submarine canyons, or frontal zones that enhance nutrient exchange and act to concentrate prey. These areas lie adjacent to major ocean currents (the ACC and the Aleutian ocean passes) and are characterized by relatively low circulation and water movement (P. Stabeno, pers. com.).

Right Whale Sightings as a Proxy for Locating the PCEs

As noted above, consistent sightings of right whales - even of single individuals and pairs - in a specific area in spring and summer over an extended period of time can be used with high confidence as an indicator of the presence of the PCEs in a feeding area. NMFS has used sighting records since the time of listing to make this determination because these records are more recent and are taken to be a more reliable indicator of current distribution of feeding whales than historical sightings, especially given that most of the latter relate to animals that were removed from the population by whaling and are thus no longer extant. Of the 184 post-listing right whale sightings reported north of the Aleutian Islands, 182 occurred within the specific area proposed as critical habitat in the Bering Sea. Since 1996, right whales have been consistently sighted in this area over a period of years during the spring and summer feeding seasons. For example, NMFS surveys alone recorded between two and four sightings in 1996 (Goddard and Rugh, 1998), 13 sightings in 2000 (Le Duc, et al.) and over 23 sightings in 2004. Single right whales as well as pairs and aggregations up to five animals were sighted during this period, and all sightings were within 100 nm^2 of one another. Based on consideration of these factors, NMFS concludes that the right whale sightings in the specific area in the Bering Sea described in Figure 2 are a suitable proxy for the presence of the PCEs and therefore proposes this area as critical habitat for the northern right whale in the North Pacific Ocean.

Recent sightings of right whales are fewer in number in the GOA than in the Bering Sea. However, three individuals were sighted recently in the specific area proposed as critical habitat in the GOA. These sightings occurred at a time when right whales typically feed in the North Pacific Ocean. In July 1998, a single right whale exhibiting behavior consistent with feeding activity was observed among a group of about eight humpback whales (Waite, Wynne and Mellinger, 2003). In August 2004, a NMFS researcher observed a single right whale among a group of humpbacks. In August 2005, a

NMFS researcher reported yet another sighting of a right whale within 250 to 500 meters of groups of humpback and fin whales. Acoustic monitoring of the area conducted in summer 2000 recorded what appeared to be right whale calls in the area on September 6 (Waite, Wynne and Mellinger, 2003). Compared to the Bering Sea sightings, the GOA right whale sightings do not provide as strong an indication of feeding right whales. However, individual right whales have been directly observed in 1998, 2004, and 2005 and detected acoustically in 2000 during the spring and summer feeding seasons in the specific area in the GOA described in Figure 2. It is also instructive that one of these animals was exhibiting feeding behavior at the time it was observed. Based on consideration of these factors, NMFS proposes that the right whale sightings in the specific area in the GOA described in Figure 2 are a reasonably reliable proxy for the presence of the PCEs and therefore proposes this area as critical habitat for the northern right whale in the North Pacific Ocean.

Activities Which May be Affected by This Revision

Section 4(b)(8) of the ESA requires that NMFS describe briefly and evaluate, in any proposed or final regulation to revise critical habitat, those activities that may destroy or adversely modify such habitat or that may be affected by such designation. A wide variety of activities may affect CH and, when carried out, funded, or authorized by a Federal agency, require that an ESA section 7 consultation be conducted. Such activities include, but are not limited to, oil and gas leasing and development on the Outer Continental Shelf, Federal fisheries management, pollutant discharges authorized by the Environmental Protection Agency, and military training exercises and other functions of the U.S. armed forces.

This proposed designation of CH will provide these agencies, private entities, and the public with clear notification of proposed CH for northern right whales in the North Pacific and the boundaries of the habitat. This proposed designation will also assist these

agencies and others in evaluating the potential effects of their activities on CH and in determining if ESA section 7 consultation with NMFS is needed.

Exclusion Process

Section 4 (b)(2) of the ESA states that CH shall be designated on the basis of the best scientific and commercial data available and after taking into consideration the economic impact, impacts to national security, and any other relevant impact. Any area may be excluded from CH if the benefits of exclusion are found to outweigh those of inclusion, unless such exclusion would result in the extinction of the species. NMFS will apply the statutory provisions of the ESA, including those in section 3 that define "critical habitat" and "conservation," to determine whether a proposed action might result in the destruction or adverse modification of CH.

Based upon the best available information, it appears that the probability of oil or gas exploration activities within (or immediately adjacent to) proposed right whale critical habitat is very low, certainly within the 10-year timeframe of NMFS' assessment. Likewise, there are no commercial production facilities in operation, currently under development, nor 'permitted' for future development, within these critical habitat areas. Unless contrary information emerges suggesting exploration and development are imminent, there is little expectation that Federal actions in the oil and gas sector will have the potential to "destroy or adversely modify" critical habitat as proposed under this action, within the analytical time horizon.

However, during the preparation of this proposed rule we became aware that the oil and gas industry has expressed current interest in exploring and developing oil and gas resources in the North Aleutian Basin OCS Planning Area. We also understand that the State of Alaska announced support for this activity. NMFS lacks specific information regarding this potential exploration and development activity and was unable to gather information in the time available to prepare this proposed rule. Therefore, NMFS

specifically requests comment on the type of exploration and development activities under consideration and the likelihood for such activities to occur, a description of the areas in the North Aleutian Basin that may be affected by any such activities, the extent to which the activities may affect the proposed critical habitat, and any other issues that may be relevant to the analysis of impacts and the exclusion process under section 4(b)(2) of the ESA. Prior to the issuance of any final rule, NMFS will attempt to gather information on this topic. Any information NMFS acquires and public comments received on these issues will be considered in analyzing the impacts of the designation of critical habitat and in the section 4(b)(2) exclusion process.

While NMFS expects to consult annually on fishery related proposed actions that "may affect" the proposed CH, none of these consultations would be expected to result in a finding of "adverse modification," and thus none would be expected to result in imposition of costs on commercial fishery participants. Because fisheries do not target or affect the PCEs for northern right whales, it then follows that no fishing or related activity (e.g., at-sea processing, transiting) would be expected to be restricted or otherwise altered as a result of critical habitat designation in the two areas being proposed. NMFS did not find any specific areas in which the costs exceed benefits for activities that may affect CH, and has therefore not proposed the exclusion of any areas from designation.

This action is anticipated to result in consultations on seafood processing waste discharges with EPA; Department of Defense (DoD) authorized military "underway training" activities; and USCG oil spill response plan approval, among others. It is unlikely that these activities will result in an "adverse modification" finding and, thus, no mandatory modifications would be imposed. It must follow then that no "costs" are imposed as a result of designation beyond the small costs attributable to inter-agency (occasionally intra-agency) consultation. As explained in the impacts analysis prepared for this action, some larger benefit accrues to society as a result of designation, including

the educational value derived from identification and designation of the critical habitat areas within which the PCEs are found. Thus, NMFS believes that the benefits of exclusion are outweighed by the benefits of inclusion.

The NMFS analysis (available on the NMFS Alaska Region website http://www.fakr.noaa.gov/) did not find any specific areas which merit exclusion in consideration of economic impacts, nor have we determined that National security interests or other relevant impacts warrant the exclusion of any specific areas from this proposed designation. NMFS solicits comments on these benefits and costs as well as our determinations.

Public Comments Solicited

NMFS requests interested persons to submit comments, information, and suggestions concerning this proposed rule to revise CH for the northern right whales in the North Pacific. This proposed action would amend the current regulations by adding CH in the North Pacific Ocean to the CH already designated along the Atlantic seaboard (Great South Channel, Cape Cod Bay, and the Southeastern United States). This proposed rule is responsive to the June 14, 2005, Northern District of California order and concerns only CH designation in the North Pacific Ocean. Comments or suggestions from the public, other concerned governments and agencies, the scientific community, industry, or any other interested party concerning this proposed rule are solicited. Comments particularly are sought concerning:

(1) Maps and specific information describing the amount, distribution, and use type (e.g., feeding, calving, migration) of northern right whale habitat in the North Pacific Ocean;.

(2) Information as to the identification of physical or biological features which may be essential to the conservation of the northern right whale in the North Pacific Ocean;

(3) Information on whether the copepods in feeding areas identified by NMFS as PCEs, or any other physical or biological features that may be essential to the conservation of the northern right whale in the North Pacific Ocean, may require special management considerations or protection;

(4) Information regarding the benefits of excluding any portions of the proposed CH, including the regulatory burden designation may impose;

(5) Information regarding the benefits of designating particular areas as CH;

(6) Current or planned activities in the areas proposed for designation and their possible impacts on proposed CH;

(7) Any information regarding potential oil and gas exploration and development activities in the North Aleutian Basin OCS Planning Area, including information on the type of exploration and development activities under consideration and the likelihood for such activities to occur, a description of the areas in the North Aleutian Basin that may be affected by any such activities, the extent to which the activities may affect the proposed critical habitat, and any other issues that may be relevant to the analysis of impacts and the exclusion process under section 4(b)(2) of the ESA;

(8) Any foreseeable economic or other potential impacts resulting from the proposed designations; and

(9) Whether specific unoccupied areas not presently proposed for designation may be essential to the conservation of the northern right whale in the North Pacific Ocean.

You may submit your comments and materials concerning this proposal by any one of several methods (see ADDRESSES). The proposed rule, maps, fact sheets, and other materials relating to this proposal can be found on the NMFS Alaska Region website at http://www.fakr.noaa.gov/. NMFS will consider all comments and information received during the comment period on this proposed rule for preparing the final rule. Accordingly, the final decision may differ from this proposal.

Public Hearings

50 CFR 424.16(c)(3) requires the Secretary to promptly hold at least one public hearing if any person requests one within 45 days of publication of a proposed regulation to revise CH. Requests for public hearing must be made in writing (see ADDRESSES) by [Insert date 45 days after publication in the FEDERAL REGISTER]. Such hearings provide the opportunity for interested individuals and parties to give comments, exchange information and opinions, and engage in a constructive dialogue concerning this proposed rule. NMFS encourages the public's involvement in such ESA matters.

Classification

Regulatory Planning and Review

This proposed rule has been determined to be significant for purposes of Executive Order 12866. As part of our exclusion process under section 4(b)(2) of the ESA, the economic benefits and costs of the proposed critical habitat designations are described in our draft economic report (NMFS, 2005). This approach is in accord with OMB's guidance on regulatory analysis (OMB Circular A-4, Regulatory Analysis, September 17, 2003).

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (5 U.S.C. 601 et seq., as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities (i.e., small businesses, small organizations, and small government jurisdictions). NMFS has prepared an initial regulatory flexibility analysis (IRFA) and this document is available upon request (see ADDRESSES). This IRFA evaluates the potential effects of the proposed CH designation on federally regulated small entities. The reasons for the action, a statement of the

objectives of the action, and the legal basis for the proposed rule are discussed earlier in the preamble. A summary of the analysis follows.

The small entities that may be directly regulated by this action are those that seek formal approval (e.g., a permit) from, or are otherwise authorized by, a Federal agency to undertake an action or activity that "may affect" CH for the northern right whale. Submission of such a request for a Federal agency's approval, from a small entity, would require that agency (i.e., the 'action agency') to consult with NMFS (i.e., the 'consulting agency').

Consultations vary, from simple to complex, depending on the specific facts of each action or activity for which application is made. Attributable costs are directly proportionate to complexity. In the majority of instances projected to take place under the proposed CH designation, these costs are expected to accrue solely to the Federal agencies that are party to the consultation. In only the most complex of "formal consultations" might it be expected that a private sector applicant could potentially incur costs directly attributable to the consultation process itself. Furthermore, if destruction or adverse modification of CH is found at the conclusions of formal consultation, the applicant must implement modifications to avoid such effects. These modifications could result in adverse economic impacts.

An examination of the Federal agencies with management, enforcement, or other regulatory authority over activities or actions within, or immediately adjacent to, the proposed CH area, resulted in the following list. Potential action agencies may include: the EPA, U.S. Coast Guard (USCG), DoD, Minerals Management Service (MMS), and NMFS. Activities or actions with a nexus to these Federal agencies that are expected to require consultation include: EPA permitting of seafood processing waste discharges at-sea; USCG oil spill response plan approval, as well as emergency oil spill response; DoD authorization of military training activities in the Bering Sea and Aleutian Islands (BSAI)

and GOA; MMS oil and gas exploration and production permitting; and NMFS fishery management actions in the BSAI and GOA.

A 10-year "post-CH designation" analytical horizon was adopted, during which time NMFS may reasonably expect to consult an estimated 27 times on CH-related actions with one or more of the action agencies identified above. The majority of the consultations are expected to be "informal," projected to represent approximately 52 percent of the total. The more complex and costly "formal" consultations are projected to account for, perhaps, 37 percent; while the simplest and least costly "pre-consultation" are expected 11 percent of the time. These figures reflect the best estimates information and experience can presently provide.

On the basis of the underlying biological, oceanographic, and ecological science used to identify the PCEs that define CH for the right whale in the Pacific, as well as the foregoing assumptions, empirical data, historical information, and accumulated experience regarding human activity in the BSAI and GOA, it is believed that only one federally authorized activity (among all those identified in the analyses and referenced above) has the potential to "destroy or adversely modify" northern right whale CH. This one class of activity is Outer Continental Shelf (OCS) oil and gas exploration and production.

As previously indicated, MMS has authority over OCS oil and gas permitting. An examination of published information from the MMS Alaska Region reveals that three MMS OCS planning areas overlap some portion of the proposed northern right whale CH areas. Further, MMS sources indicate that in only one of these has there been any exploratory well drilling (i.e., St. George Basin). A total of 10 exploratory wells were permitted, all of which were completed in 1984 and 1985 (with no subsequent associated exploration activity). It appears that there has been no activity on the part of the lease holders in this or the other four referenced areas to seek authorization to undertake additional exploratory activity or develop production facilities. MMS reports no planned

or scheduled OCS lease sales for these areas, at least through 2007 (the latest projected date MMS has published on its web site). This suggests that the only private sector entities that potentially could be directly and adversely impacted by the proposed designation would be those entities that own the lease rights to develop oil and gas production facilities in these areas. However, during the preparation of this proposed rule NMFS became aware that the oil and gas industry has expressed current interest in exploring and developing oil and gas resources in the North Aleutian Basin OCS Planning Area and that the State of Alaska announced support for this activity. NMFS lacks specific information regarding this potential exploration and development activity and was unable to gather information in the time available to prepare this proposed rule. Therefore, NMFS specifically requests comment on the type of exploration and development activities under consideration and the likelihood for such activities to occur, a description of the areas in the North Aleutian Basin that may be affected by any such activities, the extent to which the activities may affect the proposed critical habitat, and any other issues that may be relevant to the analysis of impacts and the exclusion process under section 4(b)(2) of the ESA. Prior to the issuance of any final rule, NMFS will attempt to gather information on this topic. Any information NMFS acquires and public comments received on these issues will be considered in analyzing the impacts of the designation of critical habitat and in the section 4(b)(2) exclusion process.

When MMS records were consulted as to the identity of the entities holding leases to the wells in the St. George Basin, six businesses were listed for the 10 permitted exploratory wells. These include: SHELL Western E&P Inc. (2 wells); ARCO Alaska Inc. (3 wells)]; EXXON Corp. (2 wells); Mobile Oil Corp. (1 well) (now merged with EXXON); GULF Oil Corp. (1 well); and CHEVRON USA Inc. (1 well). These data were last updated, according to the MMS website, March 17, 2005. It would appear that none of these entities could reasonably be characterized as "small," for RFA purposes. All are

widely recognized multi-national corporations and employ more than "500 full-time, part-time, temporary, or any other category of employees, in all of their affiliated operations worldwide" (the criterion specified by SBA for assessing entity size for this sector).

Under the Regulatory Flexibility Act, the preferred alternative was compared to the "No Action" (or status quo) alternative and an alternative proposed by the petitioner, the Center for Biological Diversity. NMFS rejected the "No Action" alternative because it did not comply with the remand order in Center for Biological Diversity v. Evans, Civ. No. 04-04496 (N.D. Cal. June 14, 2005) or satisfy the agency's obligations under the ESA. NMFS rejected the petitioner's alternative because the best scientific information available did not support a finding that the physical or biological features essential for conservation of the right whale in the North Pacific Ocean are found throughout the area identified by the petitioner, and thus the area did not meet the ESA definition of critical habitat.

Because NMFS' analysis did not identify costs to any small entities attributable to the CH designation action, there is no identified alternative that imposes lesser impacts on this group while achieving the requirements of the ESA and the objectives of this action.

The action does not impose new recordkeeping or reporting requirements on small entities. The analysis did not reveal any Federal rules that duplicate, overlap or conflict with the proposed action.

Military Lands

The Sikes Act of 1997 (Sikes Act) (16 U.S.C. 670a) required each military installation that includes land and water suitable for the conservation and management of natural resources to complete, by November 17, 2001, an Integrated Natural Resource Management Plan (INRMP). The recent National Defense Authorization Act for Fiscal Year 2004 (Public Law No. 108-136) amended the ESA to limit areas eligible for designation as critical habitat. Specifically, section 4(a)(3)(B)(i) of the ESA (16 U.S.C.

1533(a)(3)(B)(i)) now provides: "The Secretary shall not designate as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense, or designated for its use, that are subject to an integrated natural resources management plan prepared under section 101 of the Sikes Act (16 U.S.C. 670a), if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation." NMFS has determined no military lands would be impacted by this proposed rule.

Executive Order (E.O.) 13211

On May 18, 2001, the President issued an Executive Order on regulations that significantly affect energy supply, distribution, and use. E.O. 13211 requires agencies to prepare Statements of Energy Effects when undertaking any action that promulgates or is expected to lead to the promulgation of a final rule or regulation that (1) is a significant regulatory action under E.O. 12866 and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy.

NMFS has considered the potential impacts of this action on the supply, distribution, or use of energy and finds the designation of critical habitat will not have impacts that exceed the thresholds identified above.

Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)

In accordance with the Unfunded Mandates Reform Act, NMFS makes the following findings:

(a) This proposed rule will not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute or regulation that would impose an enforceable duty upon State, local, tribal governments, or the private sector and includes both "Federal intergovernmental mandates" and "Federal private sector mandates." These terms are defined in 2 U.S.C. 658(5)–(7). "Federal intergovernmental mandate" includes a regulation that "would impose an enforceable duty upon State, local, or tribal

governments" with two exceptions. It excludes "a condition of Federal assistance." It also excludes "a duty arising from participation in a voluntary Federal program," unless the regulation "relates to a then-existing Federal program under which $500,000,000 or more is provided annually to State, local, and tribal governments under entitlement authority," if the provision would "increase the stringency of conditions of assistance" or "place caps upon, or otherwise decrease, the Federal Government's responsibility to provide funding" and the State, local, or tribal governments "lack authority" to adjust accordingly. (At the time of enactment, these entitlement programs were: Medicaid; Aid to Families with Dependent Children work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement.) "Federal private sector mandate" includes a regulation that "would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance; or (ii) a duty arising from participation in a voluntary Federal program." The designation of CH does not impose a legally binding duty on non-Federal government entities or private parties. Under the ESA, the only regulatory effect is that Federal agencies must ensure that their actions do not destroy or adversely modify CH under section 7. While non-Federal entities who receive Federal funding, assistance, permits or otherwise require approval or authorization from a Federal agency for an action may be indirectly impacted by the designation of CH, the legally binding duty to avoid destruction or adverse modification of CH rests squarely on the Federal agency. Furthermore, to the extent that non-Federal entities are indirectly impacted because they receive Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandates Reform Act would not apply; nor would CH shift the costs of the large entitlement programs listed above to State governments.

(b) Due to the prohibition against take of this species both within and outside of

the designated areas, we do not anticipate that this proposed rule will significantly or uniquely affect small governments. As such, a Small Government Agency Plan is not required.

Takings

In accordance with E.O. 12630, the proposed rule does not have significant takings implications. A takings implication assessment is not required. The designation of CH affects only Federal agency actions. Private lands do not exist within the proposed CH and therefore would not be affected by this action.

Federalism

In accordance with E.O. 13132, this proposed rule does not have significant federalism effects. A federalism assessment is not required. In keeping with Department of Commerce policies, we request information from, and will coordinate development of, this proposed CH designation with appropriate state resource agencies in Alaska. The proposed designation may have some benefit to state and local resource agencies in that the areas essential to the conservation of the species are more clearly defined, and the PCEs of the habitat necessary to the survival of the northern right whale are specifically identified.

Civil Justice Reform

In accordance with E.O. 12988, the Department of the Commerce has determined that this proposed rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the E.O. We are proposing to designate CH in accordance with the provisions of the ESA. This proposed rule uses standard property descriptions and identifies the PCEs within the designated areas to assist the public in understanding the habitat needs of the northern right whale.

Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.)

This proposed rule does not contain new or revised information collection for

which OMB approval is required under the Paperwork Reduction Act. This proposed rule will not impose recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act

NMFS has determined that an environmental analyses as provided for under the National Environmental Policy Act of 1969 for CH designations made pursuant to the ESA is not required. See Douglas County v. Babbitt, 48 F.3d 1495 (9th Cir. 1995), cert. denied, 116 S.Ct. 698 (1996).

Government-to-Government Relationship With Tribes

The longstanding and distinctive relationship between the Federal and tribal governments is defined by treaties, statutes, executive orders, judicial decisions, and agreements, which differentiate tribal governments from the other entities that deal with, or are affected by, the Federal Government. This relationship has given rise to a special Federal trust responsibility involving the legal responsibilities and obligations of the United States toward Indian Tribes and the application of fiduciary standards of due care with respect to Indian lands, tribal trust resources, and the exercise of tribal rights. E.O. 13175 - Consultation and Coordination with Indian Tribal Governments- outlines the responsibilities of the Federal Government in matters affecting tribal interests.

NMFS has determined the proposed designation of CH for the northern right whale in the North Pacific Ocean would not have tribal implications, nor affect any tribal governments or issues. None of the proposed CH occurs on tribal lands or affects tribal trust resources or the exercise of tribal rights. The northen right whale is not hunted by Alaskan Natives for traditional use or subsistence purposes.

References Cited

A complete list of all references cited in this rulemaking can be found on our website at http://www.fakr.noaa.gov/ and is available upon request from the NMFS office in Juneau, Alaska (see ADDRESSES)

List of Subjects in 50 CFR Part 226

Endangered and threatened species.

Dated:

William T. Hogarth,
Assistant Administrator for Fisheries,
National Marine Fisheries Service.

For the reasons set out in the preamble, we propose to amend part 226, title 50 of the Code of Regulations as set forth below:

PART 226–DESIGNATED CRITICAL HABITAT

1. The authority citation of part 226 continues to read as follows:

Authority: 16 U.S.C. 1533.

2. In § 226.203, the introductory text "Northern right whale (Eubalaena glacialis)" is removed; paragraphs (a), (b), and (c) are redesignated as paragraphs (a)(1), (a)(2), and (a)(3), respectively; and new introductory text and new paragraphs (a) and (b) are added, to read as follows:

§ 226.203 Critical habitat for northern right whale (Eubalaena glacialis).

Critical habitat is designated in the North Atlantic Ocean, Bering Sea, and the Gulf of Alaska for the northern right whale as described in paragraphs (a) and (b) of this

section. The textual descriptions of critical habitat are the definitive source for determining the critical habitat boundaries. General location maps are provided for critical habitat in the North Pacific Ocean for general guidance purposes only, and not as a definitive source for determining critical habitat boundaries.

(a) North Atlantic Ocean.

* * * * *

(b) North Pacific Ocean.

(1) Primary Constituent Elements. The primary constituent elements essential for conservation of the northern right whale are the copepods Calanus marshallae, Neocalanus cristatus, N. plumchris, and Thysanoëssa raschii in areas of the North Pacific Ocean in which northern right whales are known or believed to feed, as described in paragraphs (2) and (3).

(2) Bering Sea. An area described by a series of straight lines connecting the following coordinates in the order listed:

58˚00' N/168˚00' W

58˚00' N/163˚00' W

56˚30' N/161˚45' W

55˚00' N/166˚00' W

56˚00' N/168˚00' W

58˚00' N/168˚00' W.

(3) Gulf of Alaska. An area described by a series of straight lines connecting the following coordinates in the order listed:

57˚03' N/153˚00' W

57 ˚18' N/151 ˚30' W

57 ˚00' N/ 151˚ 30' W

56˚45' N/153˚00' W

57˚03' N/153˚00' W.

(4) Maps of critical habitat for the northern right whale in the North Pacific Ocean follow: